UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

In re Holocaust Victim Assets Litigation

CV 06-0983 (FB)(JO)
CV 96-4846 (ERK)(JO)
Consolidated with
CV 99-5161 and CV 97-0461

Application of Burt Neuborne

This Document Applies to:

All Cases

MEMORANDUM OF LAW SUBMITTED BY BURT NEUBORNE
IN CONNECTION WITH OBJECTIONS TO THE REPORT AND
RECOMMENDATION OF MAGISTRATE JUDGE ORENSTEIN

Introduction

On March 15, 2007, acting in response to an order of Chief Judge Edward R. Korman, dated March 16, 2006, Magistrate Judge James Orenstein issued a Report and Recommendation (hereafter "RR __") pursuant to U.S.C §636(b)(1)(C) and Rule 72(b) of the Federal Rules of Civil Procedure. Judge Orenstein recommended an interim attorney's fee award of $3,095,325 to petitioner Burt Neuborne for seven years of service as court-designated Lead Settlement Counsel in *In re Holocaust Victim Assets Litig.*, 96 Civ. 4846 (ERK) (JO). On March 29, 2007, petitioner[1] and one set of objectors[2] filed timely objections to the Report and Recommendation with this Court, which became the

[1] Petitioner's conditional objection offered to accept the Magistrate Judge's recommendation. Unfortunately, Mr Dubbin and his clients elected to continue this unseemly proceeding, thereby triggering petitioner's conditional objection. It would be fundamentally unfair to ask petitioner to continue to endure objectors' legal challenges without asserting his legal rights.

[2] No objections have been filed by Robert Swift, leaving Samuel Dubbin and his clients as sole objectors. See RR 9; Neuborne Omnibus Declaration dated March 17, 2006, pp. 79-88.

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supervising Court upon Judge Korman's April 4, 2006 decision to recuse himself from this fee application.[3]

The Magistrate Judge's Recommendation

After noting that Judge Korman, acting in his capacity as Rule 23 supervising Judge and as a fiduciary for the plaintiff-classes, had "retained" Neuborne many years ago under an understanding that petitioner was to receive "reasonable" hourly fees for his post-settlement services as Lead Settlement Counsel (RR 8, n.3, and 21),[4] Magistrate Judge Orenstein calculated the recommended "reasonable" lodestar fee by multiplying the 6,878.5 hours concededly[5] expended by petitioner from January 26, 1999-October 1, 2005 by an hourly rate of $450, identified by the Magistrate Judge as the lowest figure falling within a subjective "reasonable" range of $450-$600 per hour. RR 65-68, 88, 98. The Magistrate Judge derived his $450-$600 "reasonable" range, not from the actual market value of petitioner's services (which the record establishes to be $700 per hour),[6] but from a wholly imaginary concoction of a hypothetical fee negotiation between petitioner and Judge Korman that not only never took place, but that turned, not on what an attorney-client market exchange would produce, but on the Magistrate Judge's assumptions concerning their respective psyches. RR 64-68. The final selection of a $450 hourly rate at the lowest end of the "reasonable" range, instead of a higher figure, was, explained the Magistrate Judge, driven, not by the value of petitioner's services, but by weighing the need of certain members of the plaintiff-classes against petitioner's fortunate status as a successful academic lawyer. RR 92-94, 95-98.

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[3] See Order of the Court dated April 4, 2006. Judge Korman recused himself because his necessarily close contact with petitioner in connection with ongoing legal proceedings affecting the settlement fund might create the impression of impropriety in dealing with petitioner's fee request.

[4] The precise quote by Judge Korman referenced by Magistrate Judge Orenstein states:

> Now I believe that Professor Neuborne is entitled to legal fees here. I agreed with him that he would be entitled to legal fees….I don't know whether you want oral argument or not, but my view is that I retained him…He rendered extraordinary service. He's entitled to be paid a reasonable fee. Transcript of Telephone Conference dated March 2, 2006 ("Conf. Tr.") at p. 5, Docket Entry ("DE") 32. See also Neuborne Omnibus Declaration, pp. 93-96.

[5] The parties have stipulated that, subject to the objectors' legal concerns, 6,878.5 hours reflected in petitioner's contemporaneous time records qualify for fees. RR 9-10. See Order dated May 18, 2006, DE 66.

[6] RR 52; Neuborne Omnibus Declaration dated March 17, 2006, pp. 94, n.38, 111-13, and Exhibit H (supporting declarations of F.A.O. Schwarz, Jr., James .Johnson, E. Joshua Rosencranz, and Dean Nancy Rapoport).

There is much wisdom and thoughtfulness in the Magistrate Judge's novel effort to reconstruct a hypothetical fee negotiation that never actually took place by imagining what people like Judge Korman and Neuborne might well have said to each other many years ago. There is also much caring and compassion in the Magistrate Judge's effort to impose a severely discounted fee that weighs the needs of certain class-members against petitioner's fortunate status in life. Indeed, if this were a purely discretionary equitable proceeding, petitioner would accept the Magistrate Judge's recommendation of a diminished "just price," despite disappointment over the amount. As the Magistrate Judge noted, petitioner's December, 2005 fee petition sought such an equitable determination, without seeking a particular sum (RR 8), and petitioner's March 29 conditional objection offered to accept the Magistrate Judge's recommendation, if the objectors would do so.

Magistrate Judge Orenstein explicitly urged the parties to allow this matter to come to rest. RR 102-103. Petitioner accepted the invitation. Unfortunately, the objectors have elected to continue challenging petitioner's legal right to any fees at all, forcing petitioner to treat this proceeding as an adversary matter of law, not a collegial search for equitable resolution.

The Nature of Petitioner's Legal Objection

Viewed as a legal matter, the Magistrate Judge was wrong in departing from fair market value as the dominant measure of the "reasonableness" of a fee awarded under the common fund doctrine,[7] and wrong in imposing a subjective "just price"[8] for petitioner's services based, not on the economic or market value of petitioner's extraordinary and remarkably successful service to the plaintiff-classes, but on the Magistrate Judge's understandable preoccupation with the worthiness and need of the plaintiff-classes. RR 67-68, 92-98. Given the Magistrate Judge's recognition of: (i) petitioner's intensely dedicated seven years of service (6,878.5 hours) at the request of the Court; (ii) the extremely high quality of petitioner's "exemplary" services (RR 87, 92-94); (iii) the extraordinary success of petitioner in designing and implementing a novel settlement, and defending it through 30 contested legal proceedings, making possible the distribution of almost $1 billion, thus far, to approximately 400,000 class members (RR 92-98); (iv) petitioner's remarkable and unexpected post-settlement success in actually increasing the settlement fund by at least $20 million (RR 92-98);[9] (v) petitioner's prior donation of many millions of dollars in fees to the plaintiff-classes by having waived his fees for playing a major role in obtaining the $1.25 billion settlement in the first place (RR 7); and (vi) the overwhelming evidence in the record of the actual fair market value of petitioner's services (RR 52), the Magistrate Judge should have awarded a minimum fee of $4,088,500, the requested amount in the original fee petition, which itself represents a voluntary discount of 20% from the minimum market value of petitioner's services to the plaintiff-classes.

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[7] Under the common fund doctrine, a lawyer who has conferred a benefit on a group (often a Rule 23 class) is entitled to a court-awarded fee payable from the common fund, keyed to the economic value of the benefit conferred. The fair market value of the lawyer's services is the preferred method of calculating the economic benefit to the group. Indeed, the term "reasonable" is often used interchangeably with fair market value. See RR 48-51. *Blum v. Stenson*, 465 U.S. 886 (1984); *McDonald v. Pension Plan*, 450 F.3d 91 (2d Cir. 2006).

[8] The "just price" reference is to the medieval practice of price control imposed by the Thomists. See Diana Woods, *Medieval Economic Thought* (2002), ch. 6. See *In re Continental Securities Litig.*, 962 F.2d 566, 568 (7th Cir. 1992)(Posner, J.)("It is not the function of judges in fee litigation to determine the equivalent of the medieval just price. It is to determine what the lawyer would receive if he were selling his services in the market rather than being paid by court order."). Modern scholarship argues that the concept of the "just price" as applied by Saint Thomas Aquinas, was, in fact, the prevailing market price. John W. Baldwin, *The Medieval Theories of Just Price* (Philadelphia 1959).

The Scope of the Proceedings in this Court

Since both petitioner and the Dubbin objectors filed timely objections under Rule 72(b) to a Report and Recommendation involving a dispositive motion,[10] this Court is obliged under §636(b)(1)(C) to undertake a *de novo* review of the Magistrate Judge's findings, but need not hold a *de novo* hearing. *United States v. Raddatz*, 447 U.S. 667 (1980); *Pinkston v. Madry*, 440 F.3d 879 (7th Cir. 2006); *Rajaratnam v. Moyer*, 47 F.3d 922, 935, n. 8 (7th Cir. 1995); *American Express Banking Corp. v. Sabet*, 512 F. Supp. 472 (S.D.N.Y. 1981), aff'd without opinion, 697 F.2d 287 (2nd Cir.), cert denied, 459 U.S. 858 (1982). Rather, the Court may review the record compiled by the Magistrate Judge, and make an independent judgment on the legal validity of the Magistrate Judge's recommendation. The Court is free, after undertaking such an independent review of the record, to affirm, reverse, modify, or remand the Magistrate Judge's recommendation.[11]

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[9] The Magistrate Judge used the uncontested figure of $20 million accruing to the class as a result of petitioner's success in persuading the banks to expedite payment of the final $334 million settlement installment to measure the minimum increase in the settlement fund attributable to petitioner's post-settlement efforts. In fact, the figure is far higher, approximating $75 million. See Omnibus Declaration of Burt Neuborne dated March 17, 2006, 22-24, 27-40, 74-76. See eg., *In re Holocaust Victim Assets Litig.*, 256 F. Supp.2d 313 (E.D.N.Y. 2002)(recovery of $5.2 million in additional interest); *Sec. 803, H.R. Conf. Rep.1836* (2001)(private bill exempting settlement fund and distributions from substantial federal income tax).

[10] Applications for attorney's fees are treated as dispositive motions within the meaning of Rule 72(b). See *Massey v. City of Ferndale*, 7 F.3d. 506 (6th Cir. 1993).

Petitioner's motion for an award of interim fees was filed on or about December 19, 2005. Despite the Supreme Court's admonition in *Hensley v. Eckerhart*, 461 U.S. 424, 437 and n.12 (1983) that fee litigation not be permitted to evolve into a satellite lawsuit, this fee proceeding has now consumed 15 months. The unseemly proceedings have been accompanied by a press campaign impugning petitioner's character and ethics. RR 14, n.6. Petitioner has no doubt that efforts to vilify petitioner will persist as long as this proceeding continues, and that credulous journalists will continue to report the proceedings inaccurately.[12] Accordingly, petitioner urges the Court, if possible, to expedite consideration of this matter in order to: (i) put an end to these protracted and unseemly proceedings; (ii) make it clear that no basis whatever exists to question petitioner's character and ethics; and (iii) award a reasonable fee approximating the value of petitioner's years of loyal and remarkably successful service to the settlement classes.

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[11] Pursuant to Rule 72(b), the parties have the responsibility of designating the portions of the record needed to carry out *de novo* review, and of responding to objections within 10 days of the filing of a timely objection. See *United States v. Mora*, 135 F.3d 1351, 1357 (10th Cir. 1998). Accordingly, petitioner respectfully files this responsive memorandum in response to the Dubbin objector's March 29, 2007 objections, and designates the following documents in the record for the Court's consideration: (1) petitioner's notice of motion, dated December 15, 2005; (2) petitioner's transmission letter, dated December 19, 2005; (3) Omnibus Declaration of Burt Neuborne, dated March 17, 2006, in support of an application for attorneys' fees, together with the Exhibits annexed thereto; (4) Petitioner's Memorandum of Law, dated December 16, 2005; (5) Petitioner's Principal Memorandum of Law, dated March 17, 2006; (6) Petitioner's Final Memorandum of Law, dated July 21, 2006; and (7) Magistrate Judge James Orenstein's Report and Recommendation, dated March 15, 2007. Courtesy copies of the record documents are being provided to the Court. The documents have already been served on Mr. Dubbin, and have been posted on the web site maintained by the settlement fund.

[12] The March 26, 2007 *New York Times* editorial purporting to describe Magistrate Orenstein's ruling is characteristically inaccurate.

The Factual Background

The facts underlying this fee application are exhaustively set forth in Magistrate Judge Orenstein's extremely thorough opinion, and in the Omnibus Declaration of Burt Neuborne dated March 17, 2006. Accordingly, petitioner will not repeat them at length. The following facts should, however, be emphasized.

1. In August, 1998, petitioner voluntarily waived his attorney's fees for having played a major role in achieving the $1.25 billion Swiss bank settlement, thereby personally providing the settlement classes with a multi-million dollar economic benefit over and above the settlement itself. RR 7; Neuborne Omnibus Declaration, pp. 2-3.

2. After playing a major role in achieving the $1.25 billion settlement in principle on August 12, 1998, petitioner ceased to work actively on the Swiss Bank case, turning, at the request of plaintiffs' counsel, to the prosecution of litigation in the District of New Jersey against German industrial defendants arising out of the use of slave labor during the Nazi era that led, in July, 2000, to the establishment of a $5.2 billion German Holocaust Foundation for the benefit of victims of Nazi persecution. Neuborne Omnibus Declaration, pp. 2-3. See *In re Nazi Era Cases Against German Defendants Litig.*, 198 F.R.D. 429 (D.N.J. 2000); *In re Austrian and German Holocaust Litig.*, 250 F.3d 156 (2d Cir. 2001); *Gross v. German Foundation Industrial Initiative*, 456 F.3d 363 (3d Cir. 2006).

3. In January, 1999, at Judge Korman's request, petitioner agreed to return to the Swiss Bank case in order to serve as one of several co-settlement counsel. In view of the unsettled nature of petitioner's duties as a co-settlement counsel, no discussion of a possible fee took place in January, 1999. On April 20, 1999, at the urging of Judge

Korman and petitioner's co-settlement counsel, petitioner reluctantly agreed to serve as Lead Settlement Counsel. RR 7; Neuborne Omnibus Declaration, 3, n. 3. Shortly thereafter, when it became clear that service as Lead Settlement Counsel would entail an enormous expenditure of time and energy, petitioner and Judge Korman, acting in his capacity as Rule 23 supervising judge and as a fiduciary for the class, orally agreed that petitioner was to be compensated at a "reasonable" hourly rate for his services as Lead Settlement Counsel. RR 8 n.3, and 21; Neuborne Omnibus declaration, pp. 94-95. See supra, n. 4.

4. As Magistrate Judge Orenstein found, when Judge Korman "retained" petitioner to serve as Lead Settlement Counsel for a "reasonable" fee, no other lawyer of comparable ability was available to carry out the demanding task of Lead Settlement Counsel at comparable or lower cost. RR 96.

5. Defending and implementing the Swiss Bank settlement posed unique and difficult challenges under *Amchem Prods v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard*, 527 U.S. 815 (1999). Neuborne Omnibus Declaration, pp. 4-5; 99. The settlement agreement, which petitioner played no role in drafting, did not allocate the $1.25 billion settlement fund among the five settlement classes, the five qualifying victim groups, and the five geographical settings in which the class-members reside, posing the prospect of a socially destructive and enormously expensive series of adversary proceedings between numerous categories of Holocaust victims, each represented by separate entrepreneurial counsel, seeking a larger share of the settlement fund at the expense of other Holocaust victims. RR 3-4 and n.2; Neuborne Omnibus Declaration, 3-5.

6. In order to avoid such a destructive and wasteful process, petitioner devised a novel "pre-commitment" implementation strategy (modeled on John Rawls' famous "veil of ignorance"), pursuant to which the entire class was asked, in connection with the Rule 23(e) fairness hearing, to pre-commit to the outcome of a carefully described fair allocation process involving a neutral Special Master, review by the District Court, and enforcement by Lead Settlement Counsel, without knowing what the precise outcome of the process would be. Class members who declined to pre-commit to the outcome of the fair allocation process were given the opportunity to opt out and pursue their own remedies. The plaintiff classes overwhelmingly endorsed the pre-commitment strategy, returning 573,000 questionnaires expressing a desire to participate in the allocation process. Fewer than 200 persons opted out. RR 4, n.2; Neuborne Omnibus Declaration, 4-5.

7. The pre-commitment strategy required petitioner to play an indispensable and varied role as a single Lead Settlement Counsel for an extremely varied series of classes. For example, petitioner's first task as Lead Settlement Counsel was to speak for the extremely diverse five settlement classes, the five victim groups, and the five geographical areas in representing to Judge Korman, pursuant to Rule 23(e), that the $1.25 billion settlement and the contemplated allocation process was fair to the entire class. *In re Holocaust Victim Assets Litig.,* 105 F. Supp.2d 139 (S.D.N.Y. 2000). Under *Amchem Prods v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard*, 527 U.S. 815 (1999), however, a single economically-conflicted lawyer may not speak for an extremely diverse set of classes at a Rule 23(e) fairness hearing if the lawyer has a financial stake in the approval of the settlement because such a lawyer would face an

insuperable conflict of interest between his financial best interests in having the settlement approved, and unconflicted service to the entire class.

8. Accordingly, in order to avoid jeopardizing the entire settlement under *Amchem*, it was necessary for petitioner to place on the record in every communication with the Court in any proceeding implicating the settlement's structure and the validity of the pre-commitment strategy that petitioner had waived fees for obtaining the settlement and, thus, had no financial stake in whether the settlement itself or the pre-commitment strategy governing allocation was accepted by the Court as fair. RR 20-48; Neuborne Omnibus Declaration, 90-101.

9. No similar *Amchem* problem existed during the post-settlement stage since Lead Settlement Counsel's "reasonable" hourly compensation was in no way linked to his substantive positions, and because his duty required him to enforce the lawful outcome of the fair allocation process whether or not he agreed with it as a personal matter. RR. 72-84, especially 81, n. 33.

10. Petitioner's second principal task as Lead Settlement Counsel under the pre-commitment strategy was to guide class members through the neutral allocation and distribution process, and to enforce the outcome of the allocation process, even if the result of the fair process disappointed an individual member of the class, and even if petitioner disagreed with the lawful outcome. In the absence of such a reliable "enforcement" arm, the pre-commitment strategy would have unraveled. RR 72-84.

11. In the vast bulk of settings, class members accepted the outcome of the fair allocation process, even when it disappointed their hopes. A small group of class-members, represented by Samuel Dubbin, has, however, consistently refused to accept

the legitimacy of the pre-commitment strategy; and has vigorously opposed Judge Korman's application of the *cy pres* doctrine to allocate settlement funds for the relief of extremely poor Jewish survivors to survivors residing in the former Soviet Union. Their objections have been uniformly rejected by the Courts. *In re Holocaust Victim Assets Litig.*, 424 F.3d 132 (2d Cir. 2005), cert. denied, 126 S.Ct. 2891 (2006); *In re Holocaust Victim Assets Litig.*, 413 F.3d 183 (2d Cir. 2001).

12. Petitioner's third task as Lead Settlement Counsel was the more conventional duty to defend the settlement fund, assure compliance with the terms of the settlement agreement, and take steps needed to assure its efficient implementation. In performance of that function, petitioner has repeatedly induced the defendants banks, through a combination of litigation and negotiation, to: (i) pay compound interest on the settlement fund, resulting in a gain to the settlement fund of $5.2 million (*In re Holocaust Victim Assets Litig.*, 256 F. Supp.2d 313 (E.D.N.Y. 2002); (ii) accelerate payment of the final $334 million installment of the settlement principal by 10 months, resulting in a conceded gain to the settlement fund of $20 million in additional interest (RR 92-93); (Neuborne Omnibus Declaration, pp. 22-24); and (iii) provide information needed to administer a fair claims process, making possible the distribution of almost $1 billion, thus far, to approximately 400,000 persons. *In re Holocaust Victim Assets Litig.*, 02-3314 (Block, J.). In addition, at the direction of the District Court, Lead Settlement Counsel reviewed all requests for attorneys' fees payable from the settlement fund, and succeeded in limiting fees to approximately $7 million over a 10 years period. Eg., *In re Holocaust Victim Assets Litig.*, 270 F. Supp. 313 (E.D.N.Y. 2002); *In re Holocaust Victim Assets Litig.*, 302 F. Supp.2d 89, rehearing den., 311 F. Supp. 2d 363 (EDNY 2004), aff'd 424 F.3d 150

(2d. Cir. 2005). Finally, working closely with co-settlement counsel, Melvyn Weiss, petitioner persuaded Congress to enact a private bill exempting the settlement fund and its distributions from federal income tax, bestowing a massive financial benefit on class members.[13] See Sec. 803, H.R. Conf. Rep. 1836 (2001). Neuborne Omnibus Declaration 22-24, 74-76.

13. The novel pre-commitment strategy developed by petitioner has been an unqualified success. Instead of a socially destructive and enormously expensive adversary allocation process, the $1.25 billion settlement fund has been assembled and allocated fairly, with almost $1 billion distributed, thus far, to 400,000 persons as a result of meticulously fair individualized claims program. RR 92-95, 98.

14. Petitioner has worked intensively on behalf of the settlement classes for the past eight years. From January 29, 1999-October 1, 2005, the time period covered by this petition, the parties have stipulated that petitioner expended 6,878.5 billable hours. RR 88-89. Neuborne Omnibus Declaration, pp. 123-38.

15. The quality of petitioner's work has been universally applauded as "exemplary" and "brilliant." RR 92-94, 98.

16. Petitioner's overall level of success has been remarkable, resulting in: (i) the design and implementation of a complex and novel settlement involving the allocation and distribution of almost $1 billion to approximately 400,000 persons at the, thus far,

[13] But for the private bill, the marginal tax rate on taxable interest income earned by the fund would be 36%. The fund has earned considerably more than $200 million in interest. Moreover, many distributions would have been taxable at the marginal rates of the class members who have received almost $1 billion tax free as a result of the efforts of petitioner and Mr. Weiss. Objectors argue that no credit should go to counsel for persuading Congress to grant targeted tax relief to the settlement fund, but present absolutely no reason for treating petitioner's success in persuading Congress to pass a private bill confined to the settlement fund differently from his success in persuading this Court to award compound interest to the settlement fund, or in persuading the defendant banks to accelerate payment of the final settlement installment of $334 million.

remarkably low legal cost of $7 million over a 10 year period; (ii) an unanticipated increase in the settlement fund of between $20-$75 million attributable to his post-settlement efforts; and (iii) the successful defense of the settlement fund in 30 contested proceedings at every level of the federal judiciary. RR 87, 92-95, 98.

Argument

I.

THE MAGISTRATE JUDGE ERRED IN FAILING TO USE FAIR MARKET VALUE TO MEASURE A "REASONABLE" FEE FOR PETITIONER

Magistrate Judge Orenstein correctly noted that the single most important event in this fee proceeding was a conversation that took place years ago between petitioner and Judge Korman, acting in his capacity as Rule 23 supervising Judge and as a fiduciary for the settlement classes, at which it was agreed that given the massive time, energy and intellectual creativity required to successfully serve as Lead Settlement Counsel, it was appropriate to pay petitioner a "reasonable" hourly rate for his post-settlement work.

The conversation was emotional. Judge Korman, observing that petitioner was ill-at-ease about seeking post-settlement fees after having waived pre-settlement fees in honor of his recently deceased daughter, comforted petitioner by reminding him that the post-settlement work was unrelenting and crucial, and that petitioner owed a duty to his surviving family, as well as to the dead.[14] Neuborne Omnibus Declaration, pp. 94-95. Petitioner recalls that the emotional conversation with Judge Korman concerning post-settlement fees took place in the Spring of 1999, shortly after his formal appointment as Lead Settlement Counsel, and was repeated in February 2000 while petitioner was describing to Judge Korman the extremely wearing task of re-negotiating, at the Court's direction, aspects of the original settlement agreement to assure the flow of information needed to administer the bank account claims process. Neuborne Omnibus Declaration, pp. 27-40. Judge Korman recalls that the conversation took place somewhat later that year, as part of a general discussion of fees. Id at 95, n. 40. It is possible that the topic of petitioner's "reasonable" post-settlement fees was discussed on several occasions.

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[14] Petitioner expresses gratitude to Judge Korman for his sensitive reaction seven years ago to petitioner's request for a reasonable fee for post-settlement work that had become overwhelming. In his conversations with the Court, petitioner agreed not to seek fees until he was successful in piloting the settlement to a successful conclusion. Neuborne Omnibus Declaration, p. 95. It was only after the Second Circuit had finally rejected all challenges to the settlement's structure in *In re Holocaust Victim Assets Litig.*, 424 F.3d 132 (2nd Cir. 2005), cert. denied, 126 S.Ct. 2891 (2006), and distribution neared $1 billion, that a fee application by petitioner was deemed timely by both petitioner and Judge Korman.

Given such a conversation, the Magistrate Judge found – and petitioner agrees – that the principal task of the Court is to determine what constitutes a "reasonable" fee for seven years of intensive, remarkably successful, dedicated service that is universally conceded to have been "exemplary," and that left the settlement classes between $20-$75 million richer as a direct result of petitioner's post-settlement legal efforts. Instead of following clear Circuit and Supreme Court precedent equating a "reasonable" fee with the fair market value of a lawyer's services,[15] however, the Magistrate Judge reasoned that in light of the unique and extraordinary nature of this litigation, a "reasonable" fee in this case would not necessarily track the actual market. Rather, reasoned Magistrate Judge Orenstein, given petitioner's demonstrated willingness to work *pro bono* in other cases, and the extraordinarily sympathetic nature of the plaintiff-classes, the best measure of a "reasonable" fee would be to reconstruct a hypothetical conversation about fees between Judge Korman and petitioner that never took place. While paying formal obeisance to the legal obligation to set a market rate, the Magistrate Judge voided of any

[15] Eg., *Farbotko v. Clinton County*, 433 F.3d 204, 208 (2d Cir. 2005); *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000); *Wal-Mart Stores, Inc. v. Visa USA Inc.*, 396 F.3d 96 (2d Cir. 2005); *McDonald v. Pension Plan of the NYSA-ILA Pension Trust Fund*, 450 F.3d 91 (2006).

meaning the very idea of fair market value by holding that no "correct" market rate exists for an extraordinary case like this one, leaving the Magistrate Judge free to derive the equivalent of a medieval "just price" for petitioner's "exemplary," remarkably successful services to the class by inventing a fictive hypothetical bargain. It is difficult to imagine what is left of this Circuit's repeated equation of a reasonable fee with one that is market-derived if the relevant "market" can be reduced to divining the price that a given judge might have assigned pursuant to a hypothetical bargain, based on nothing more than surmise, conjecture and subjective intuition.

Even on its own (legally incorrect) terms, the Magistrate Judge's imagined reconstruction of the hypothetical bargain is deeply counter-factual. For example, it was inaccurate for the Magistrate Judge to have assumed that because petitioner has engaged in the very substantial *pro bono* litigation described at RR 67, n. 29 (for which he accepts no fees), he would have declined to seek market fees in his fictive conversation with Judge Korman. RR 66-67. The Magistrate Judge overlooked the fact that none of the significant recent *pro bono* cases generously noted at RR 67, n. 29, for which petitioner receives no compensation, involved the creation of a significant common fund. If any of the cases recited by the Magistrate Judge had generated more than $1 billion in common funds, petitioner would certainly have sought a "reasonable" market-based fee. Indeed, petitioner did just that 20 years ago in *Cullen v. Margiotta* (the Nassau County "one-percent" case), a case generating a significant common fund, in which Chief Judge Mishler awarded petitioner a fair market fee for years of service to the plaintiff-classes. Neuborne Omnibus Declaration, p.113.

It was equally inaccurate for the Magistrate Judge to have speculated that petitioner would have agreed to further discount his fee, or that Judge Korman, acting as a fiduciary with knowledge of the future, would have insisted on a discount of more than the 20% currently offered by petitioner. As petitioner explained in his December 19, 2005 letter of transmission (a copy of which has been provided to the Court), having already waived many millions of dollars in fees for obtaining the settlement in the first place, petitioner was unwilling to engage in further discounts. And, if Judge Korman had been informed that petitioner would not only succeed in piloting the settlement to a remarkably successful conclusion, with a distribution of almost $1 billion, to date; an increase in the settlement fund's value of between $20-$75 million; and the successful re-negotiation of crucial clauses providing for the provision of information needed to administer meaningful individualized claims proceedings, he would certainly have recognized a $4 million discounted market fee as the bargain that it is. ("If my [the Magistrate Judge's] task were purely to pick what I believe to be a fair amount of compensation for Neuborne's services as Lead Settlement Counsel, I might well recommend an award higher than $3.1 million."). RR 98.

Finally, Judge Korman would almost certainly have agreed to pay petitioner at least the same hourly rate ($600) that he eventually granted to Robert Swift in awarding fees for Mr. Swift's pre-settlement work.[16] See *In re Holocaust Victim Assets Litig.*, 270 F. Supp.2d 313, 325 (E.D.N.Y. 2002)(awarding more than $1.2 million for 2,000 hours, or $600 per hour, to Robert Swift). Judge Korman augmented Mr. Swift's hourly rate with a modest (1.32) excellence multiplier that resulted in an award of $1.2 million for an expenditure of 2,000 hours, or $600 per hour. Since, as a matter of Second Circuit law, the award to Mr. Swift must, of necessity, have satisfied the controlling "reasonableness" standard, that award must form a baseline law of the case controlling the definition "reasonableness" in connection with the setting of a "reasonable" fee for petitioner. Thus, the Magistrate Judge's dramatic downward departure from the net hourly fee rate awarded to Mr. Swift by Judge Korman must reflect one of three things: (i) a determination that Mr. Neuborne is not a lawyer of the same stature, experience or skill as Mr. Swift (a finding the Magistrate Judge clearly did not make); (ii) a determination that petitioner's services were not as valuable to the settlement-classes as Mr. Swift's (a finding the Magistrate Judge clearly did not make); or (iii) that petitioner's fee is not being set under the same standards of "reasonableness" as Mr. Swift's.

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[16] Petitioner rejects the Magistrate Judge's ill-considered suggestion that payment of fully justified fees to petitioner in unrelated litigation reflecting extraordinary success in assembling funds for Holocaust victims would have motivated Judge Korman to have refused to pay petitioner the fair value of his services in this case. Courts simply lack power to impose cumulative limits on the amount that can be earned by one lawyer in multiple successful cases.

Comparison with Judge Korman's disciplined market-based award to Mr. Swift highlights the legal error in the Magistrate Judge's hypothetical reconstruction of a fictive fee bargain. The Magistrate Judge's "hypothetical reconstruction/just price" approach explicitly invites reviewing courts to vary the "reasonableness" of common fund fee awards on the basis of a judge's subjective assessment of the relative worthiness and need of varying categories of common fund plaintiffs, such as Holocaust victims in this case, and cancer victims, victims of racial discrimination, victims of gender discrimination, and/or victims of accounting fraud in other cases. In fact, the law requires a single common fund fee standard for all litigants, regardless of whether they find particular favor or sympathy with a reviewing court. That is why the Supreme Court, and every

Circuit to have considered the matter, has insisted upon a fee standard keyed to the objective fair market value of a lawyer's services. *Blum v. Stenson*, 465 U.S. 886 (1984); *McDonald v. Pension Plan*, 450 F.3d 91 (2d Cir. 2006). On this record, no doubt exists that the objective fair market value of petitioners' services under governing Second Circuit precedents is $700 per hour (RR 52), which petitioner has discounted by approximately 20% to reach a fee request of $4,088,500.

II.

THE MAGISTRATE JUDGE ERRED IN SELECTING AN HOURLY RATE AT THE LOWEST END OF HIS "REASONABLE" RANGE, DESPITE PETITIONER'S EXEMPLARY SERVICE AND REMARKABLY SUCCESSFUL RESULTS

After inventing the hypothetical fee conversation described above, the Magistrate Judge announced that the "reasonable" fee that Judge Korman and petitioner would probably have agreed upon would have ranged between $450-$600 per hour. RR 51, 68. The Magistrate Judge then acknowledged that petitioner's work in piloting the settlement through 30 contested proceedings and several intensive re-negotiations leading to the distribution of almost $1 billion to approximately 400,000 persons, to date, had been extraordinary, warranting an excellence multiplier in an ordinary case. RR 87, 92-94, 98. Magistrate Judge Orenstein also found that in addition to the extraordinary implementation work, petitioner's post-settlement services had actually increased the settlement by at least $20 million,[17] an achievement that would warrant petitioner's full fee even if nothing were awarded for the implementation work. RR 94-95.

Despite such positives, however, Magistrate Judge Orenstein recommended an unenhanced lodestar based upon an hourly rate at the lowest end of his "reasonable"

[17] In fact, the increase in the settlement fund attributable to petitioner's work is closer to $75 million. See nn. 9, 13, *supra*.

range, or $450 per hour, explaining that the needs of the class justified ignoring petitioner's remarkable success and justified limiting petitioner's fee to the lowest possible figure, or $450 per hour. The Magistrate Judge purported to find authority to set an hourly rate far below the market by applying the six factors set forth in *Goldberger v. Integrated Res. Inc.*, 209 F.3d 43 (2d Cir. 2000). RR 88-98. While recognizing that four of the factors – time and labor expended (RR 88-89); complexity and magnitude (RR 89-91); quality (RR 92-94); and the size of the benefit conferred (RR 94-95) - call for a far higher fee, the Magistrate Judge erroneously held that a fifth factor – risk – did not exist in this setting. RR 91-92. But the Magistrate Judge overlooked the fact that petitioner undertook a significant risk by agreeing not to seek fees unless he was successful in piloting the settlement to a successful conclusion. Given the novelty of the pre-commitment strategy, that was a significant risk, as demonstrated by the ferocity of the attacks launched on the settlement's structure by Mr. Dubbin and his clients, and other disappointed class-members. See *In re Holocaust Victim Assets Litig.*, 424 F.3d 132 (2nd Cir. 2005), cert. denied, 126 S.Ct. 2891 (2006)(Dubbin objectors); *In re Holocaust Victim Assets Litig.*, 424 F.3d 159 (2nd Cir. 2005)((gay community); *In re Holocaust Victim Assets Litig.*, 424 F.3d 169 (2nd Cir. 2005)(disabled community); and *In re Holocaust Victim Assets Litig.*, 00-9593 (2d Cir. 2000)(withdrawn after full briefing)(Romani community).

It was, however, the sixth *Goldberger* factor – the public interest - on which the Magistrate Judge leaned most heavily in insisting upon a sub-market rate. RR 95-98. Unfortunately, the Magistrate Judge construed the term "public interest" to permit him to set a sub-market rate using subjective criteria of relative need having absolutely nothing to do with the value of petitioner's services to the settlement classes. With respect, the "public interest" as used in *Goldberger*, is not an invitation to ignore the economic value of a lawyer's services when they are devoted to a particularly sympathetic or needy class. Such an approach to the "public interest" sets exactly the wrong economic incentive by penalizing lawyers who devote themselves with remarkable success to sympathetic and needy clients, while offering lawyers a greater economic incentive to serve less sympathetic clients.

If an unprecedented departure from fair market value is to be undertaken, petitioner urges that the concededly exemplary quality of his legal services, coupled with petitioner's extraordinary level of success in increasing the settlement fund by between $20-$75 million, require, as a matter of law, an equitable "just price" fee award at the high end of the Magistrate Judge's $450-$600 range, or $4,088,500. If the Magistrate Judge had expressed doubts over: (i) the quality of petitioner's work; (ii) its extraordinary success in implementing an unprecedented class action settlement; or (iii) its unanticipated successes in supplementing the fund by between $20-75 million, petitioner would not have grounds to complain about a decision to award a fee at significantly under the market rate. But where, as here, petitioner's work has been adjudged an unqualified success that showered the class with unexpected benefits, it is unduly intrusive for the Magistrate Judge to insist on a sub-market rate in the face of the law of the Circuit setting the benchmark for fees as market rates and economic value, not the level of sympathy of a particular class.

III.

THE MAGISTRATE JUDGE CORRECTLY REJECTED THE OBJECTIONS TO PETITIONER'S FEE APPLICATION

The Dubbin objectors[18] re-assert the identical arguments that were considered and rejected by Magistrate Judge Orenstein. First, they argue that notice of the fee petition was inadequate under Rule 23(h)(1) because it was not directed personally to the more than one million members of the class, regardless of the huge and needless expense that such personal notice would entail. Magistrate Judge Orenstein correctly held that even if "reasonable notice" is required under Rule 23(h)(1), the combination of: (i) personal service on all class-members in 1999, alerting them to possible fee awards totaling $22 million, of which only $7 million have been paid, to date; (ii) personal service of the current fee application on all settlement counsel; (iii) personal service of the fee application on Mr. Dubbin as counsel for dissenting class members; (iv) publication on the classes' web site of all documents relating to the fee petition, including all objections; and (v) the unprecedented world-wide news coverage of the fee application provided unquestioned "reasonable notice" of the fee application within the meaning of Rule 23(h). RR 11-16. See RR 14, n. 6; Neuborne Omnibus Declaration, pp. 88-90.

Second, the Dubbin objectors continue to press their "no good deed goes unpunished" objection, arguing that because petitioner voluntarily waived many millions of dollars in fees for having obtained the $1.25 billion settlement, he is judicially

[18] It is doubtful whether Mr. Dubbin's clients have Article III standing to object to the Magistrate Judge's Report and Recommendation. RR 16, nn 7 and 8, 49, n 17. As Magistrate Judge Orenstein notes, none of the objectors has even a *de minimis* financial stake in the size of petitioner's fee. In the absence of such a tangible stake in the outcome of this proceeding, the Dubbin objectors lack Article III standing to lodge a legally cognizable objection to the Magistrate Judge's recommendation.

estopped from seeking reasonable fees for his seven years of dedicated post-settlement service as court-designated Lead Settlement Counsel. The Dubbin objectors base their judicial estoppel argument on an erroneous assertion that petitioner misled the Court and the class about his agreement with Judge Korman to seek "reasonable" hourly fees for the grinding work of Lead Settlement Counsel.

Magistrate Judge Orenstein painstakingly refuted the judicial estoppel challenge (RR 24-48), finding that far from misleading Judge Korman, petitioner had actually entered into an explicit agreement with him early in his service as Lead Settlement Counsel to receive "reasonable" hourly fees for his hugely time-consuming post-settlement work as Lead Settlement Counsel. RR 8, n.3, 21. See supra at n.4. Indeed, the Magistrate Judge found that there simply was no one else available to perform the tasks with a comparable level of ability at lower cost. RR 96.

The Magistrate Judge then meticulously considered every communication made by petitioner to the Court between 1999-2005 cited as allegedly misleading by Mr. Dubbin, and found that no misleading or inconsistent statements exist. RR 24-41. In fact, the Magistrate Judge recognized that petitioner's careful recitation of his pre-settlement *pro bono* status on numerous occasions was deemed necessary to avoid potential conflict of interest charges under *Amchem*. Since petitioner, as Lead Settlement Counsel, was representing a large and varied number of class members with potentially conflicting interests in seeking approval of the settlement under Rule 23(e), and since plaintiffs' counsel would qualify for payment only if the settlement's fairness were approved, it was vital to recite the absence of any financial stake in petitioner's supporting the settlement's fairness to avoid jeopardizing the entire settlement under *Amchem*.

Finally, despite the Dubbin objectors' confusion on the question, no such *Amchem* concern operated during the post-settlement phase because Lead Settlement Counsel's hourly compensation was – and is - wholly unconnected to his substantive positions. RR 81, n.33. Since petitioner is entitled to the same hourly compensation regardless of his substantive positions, no risk of *Amchem* conflict required *pro bono* service during the post-settlement phase. Id.

Third, the Dubbin objectors continue to challenge an award of fees for 800 hours expended in defending Judge Korman's *cy pres* allocation decisions against challenges brought principally by the Dubbin objectors. Magistrate Judge Orenstein correctly held that defense of the District Court's allocation decisions clearly fell within the task of Lead Settlement Counsel, and that petitioner had carried out the task with complete ethical propriety. RR 72-84. Indeed, Magistrate Judge Orenstein found that defense of the lawful outcome of the allocation process was a central duty of Lead Settlement Counsel. RR 81.

Fourth, Mr. Dubbin attempts to limit petitioner's compensable hours to the 600 hours expended in increasing the settlement fund by between $20-$75 million. Magistrate Judge Orenstein correctly pointed out that petitioner's success in increasing the settlement fund by at least $20 million was over and above his primary duty to defend the fund and implement the settlement. RR 70-72. Indeed, Magistrate Judge Orenstein observed that petitioner's success in expanding the settlement fund by at least $20 million would, standing alone, justify his fee without regard to the more than 6,800 hours expended in making possible the distribution of almost $1 billion to more than 400,000 persons. Id.

Finally, the Dubbin objectors posit a series of utterly unsupported sub-market measures of petitioner's hourly lodestar, ranging from his hourly wage as a law professor, to a fictitious statewide blended rates, all of which were properly rejected by Magistrate Judge Orenstein as clearly unlawful. RR 52-59. In fact, the record irrefutably demonstrates that petitioner's fair market lodestar is $700 per hour, the rate that his services command in the relevant market. RR 52.

Conclusion

Since Magistrate Judge Orenstein was clearly correct in rejecting Mr. Dubbin's objections to petitioner's fee application, and since the value of petitioner's "exemplary" and remarkably successful service to the settlement classes, measured either by petitioner's fair market billing rate; or at the appropriately high end of the Magistrate Judge's hypothetical range, cannot be fairly valued at less than $4,088,500, petitioner urges the Court to accept the vast bulk of the Magistrate Judge's thoughtful Report and Recommendation, modifying it solely to reflect an award at the higher end, not the lowest end, of the Magistrate Judge's range of between $450-$600 per hour, resulting in an award of $4,088.500.

Dated: New York, New York
April 10, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Laurent Sacharoff, hereby certify that on April 12, 2007, I caused a copy of the Memorandum of Law Submitted by Burt Neuborne in Connection with Objections to the Report and Recommendation of Magistrate Judge Orenstein, to be served electronically upon:

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